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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RODELIO LIMPO CATAROJA,

Defendant and Appellant.

D055257

(Super. Ct. No. SCD213198)

APPEAL from a judgment of the Superior Court of San Diego County, Frances M. Devaney, Judge. Reversed.

Rodelio Limpo Cataroja was convicted by a jury of one count of burglary under Penal Code¹ section 459 in connection with the taking of a day planner from an unlocked car in an open garage. The jury also found that the burglary was of an inhabited house (§ 460) and an individual was home during the offense. (§ 667.5, subd. (c)(21).) Cataroja waived his right to a jury trial on the issue of priors and the trial court found that

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

Cataroja had previously been convicted of a felony (§ 1203, subd. (e)(4)), he had suffered five prison priors (§§ 667.5, subd. (b), 668), he had suffered a serious felony prior (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)), and he had suffered a strike prior. (§§ 667, subds. (b)-(i), 668, 1170.2.)

Cataroja contends the trial court abused its discretion by admitting evidence of his commission of uncharged burglaries to prove his identity as the perpetrator in the charged robbery. We agree that the trial court abused its discretion by admitting evidence that Cataroja committed the uncharged offenses. Because it is reasonably probable that a result more favorable to Cataroja would have been reached if the court had not improperly admitted the evidence of the uncharged offenses, we reverse the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. The Charged Offense and First Trial

Ashley Cecaci was working as a nanny at a home in the Carmel Valley area of San Diego. Cecaci was returning to the home when she observed a suspicious truck on the street. The truck was blocking a portion of the sidewalk and was parked in a neighbor's driveway. Cecaci then observed an unfamiliar man run across the neighbor's yard and into the open garage of the home she worked in. The man went into the front passenger seat of her employer's vehicle.

Cecaci distracted the man by yelling at him, "Who are you? What are you doing?" The man ran back to his truck and drove off. Ms. Cecaci wrote down the license plate number. Cecaci's employer, Phyllis Hartman, was inside the home at the time of the

incident, yet had been unaware of the situation until Cecaci notified her of what had taken place. Ms. Hartman realized later that day that her red leather day planner had been taken from her vehicle. The police interviewed Cecaci about the incident and used the license plate number provided to locate a vehicle registered to Rex Cataroja, and appellant, Rodelio Cataroja. The police then created a six-pack photographic lineup for Cecaci to make an identification, and she identified the appellant as the man she saw enter the garage. She also identified the appellant in the courtroom.

The first trial was held on October 15, 2008. Evidence of prior bad acts was not presented during the trial. The jury eventually informed the court that it was deadlocked and the court declared a mistrial.

B. The Uncharged Offenses and Second Trial

In between the first and second trial, the appellant was convicted of charges relating to commercial burglary, use of personal identifying information of another person, and grand theft. At the second trial, the district attorney sought to introduce evidence of appellant's prior conduct of using stolen credit cards from burglarized homes as proof of identification, modus operandi, intent and knowledge pursuant to Evidence Code section 1101, subdivision (b).

The trial court admitted the prior incidents based on the similarity of the incidents and the passage of time. Cataroja's counsel requested that the court exclude the evidence, given that appellant had not been accused of residential burglary in any of the prior offenses. Residential burglary was the charge in the instant action. The court found that

regardless of what appellant had been accused and convicted of in the prior action, the underlying bad acts were significant:

"The entering of a garage, entering of vehicles in those garages, taking of purses, and satchels, and whatever may be, were substantially similar to what occurred in this case, and they occurred right about the same time as this case as well. So I do think they are relevant, and I'll allow them into evidence."

The People put two witnesses on the stand to discuss the prior bad acts. Julia Puentes, a resident of Carlsbad, California, testified that her purse and wallet had been stolen from her unlocked vehicle that had been parked in her garage, as the garage had been left open. She was unaware that the items had been taken until she received notification from one of her credit card companies of possible unauthorized purchases. Lisa McKnight, another Carlsbad resident, similarly testified that a credit card company notified her of potential unauthorized use of her credit cards, and only at that point did she realize that her wallet had been taken from her vehicle, parked inside her open garage. The court also read a stipulation concerning another potential witness's testimony. The stipulation included, "Wendy Payne lives on the 7000 block of Black Swan Court in Carlsbad, California. On January 17th of 2008, between 3:00 and 4:45 p.m., an unknown individual entered into her unlocked vehicle in her open garage and stole her purse containing her credit cards." The stipulation went on to state that a Target loss prevention officer would testify that appellant was observed on the Target video surveillance system using credit cards belonging to Ms. Puentes, Ms. McKnight, and Ms. Payne. The appellant was not identified as having committed the residential burglaries nor was he charged with residential burglary.

Appellant's brother, Rex Cataroja testified for the defense that he owned the truck identified as having been used in the incident. Cataroja's father primarily used the truck, and has retained possession of it since it was purchased in 1999. Rex testified that he took the truck from appellant on April 8, 2008 after a family argument and after that date appellant no longer had possession of keys. Rex also testified that appellant had in the past loaned family vehicles to other individuals who did not have permission to drive those vehicles.

The jury found appellant guilty of burglary under section 459, and further found that the burglary was of an inhabited house pursuant to section 460, and that an individual was home during the commission of the offense within the meaning of section 667.5, subdivision (c)(21).

II

DISCUSSION

The appellant contends that the trial court erred by permitting the introduction of the prior bad acts under section 1101 of the Evidence Code because the prior acts were not substantially similar to the instant action, given that appellant was not linked to any residential burglary in the prior acts. Under Evidence Code section 1101, evidence of a person's character or a trait of his or her character is inadmissible to prove his or her conduct on a specified occasion; however, evidence that a person committed a crime, civil wrong or other act is relevant to prove some fact other than his or her disposition to commit such an act, such as plan or intent. (Evid. Code, § 1101, subds. (a), (b).) The California Supreme Court has held that the greatest degree of similarity between prior

acts and the instant offense is required when the prior acts are being introduced to prove identity. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403 (*Ewoldt*).) In demonstrating identity, the pattern and characteristics of the common features of the charged and uncharged acts must be so unusual and distinctive as to be like a signature. (*Ibid.*)

We find that Evidence Code section 1101 requires exclusion of the evidence of appellant's uncharged misconduct. Even though the uncharged offense and the uncharged misconduct share common features distinctive enough to be relevant on the issue of identity, there is no evidence that Cataroja actually committed the uncharged burglaries. He was never charged with the burglaries, but was instead charged with offenses related only to use of the property which had been taken. The burglaries could well have been committed by someone other than Cataroja.

Even if we found the evidence relevant on the issue of identity under Evidence Code section 1101, that would not be the end of our analysis. We next have to look to section 352 of the Evidence Code and determine whether the probative value of admitting the evidence is "outweighed by the probability that its admission [would] create substantial danger or undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "Evidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis' " and is admissible only if the evidence has substantial probative value. (*Ewoldt, supra*, 7 Cal.4th at p. 404.) The principal factor affecting the probative value of the appellant's uncharged offenses is the tendency of that evidence to establish identity in the charged offenses. (*Ibid.*) The prejudice Evidence Code section 352 is concerned with is the prejudice which " "uniquely tends to evoke an

emotional bias against the defendant as an individual and which has very little effect on the issues," ' ' not the prejudice "that naturally flows from relevant, highly probative evidence." ' ' (*People v. Salcido* (2008) 44 Cal.4th 93, 148.)

Even if relevant, the tendency of the evidence to establish identity in the charged burglary is weak, considering no direct evidence existed linking appellant to the scene of the substantially similar uncharged acts. The People contend that the prior incidents have high probative value, given the numerous distinctive similarities between the prior incidents and the charged offense. If Cataroja had been directly linked to any of the prior residential burglaries the People's contention would probably be true, but the attenuated link between Cataroja and the burglaries significantly diminishes the probative value of the evidence. Making a deduction that, because Cataroja had stolen property from uncharged burglaries he probably committed the uncharged burglaries, and because the uncharged burglaries were similar to the charged burglary he probably also committed the charged burglary, requires too many inferential steps to have any significant probative value.

We find that the trial court abused its discretion in admitting the evidence because the weak probative value of the evidence is substantially outweighed by its prejudicial effect. Evidence of uncharged offenses is presumed to be prejudicial. (*See Ewoldt, supra*, 7 Cal.4th at p. 404.) The evidence suggesting that appellant committed the uncharged residential burglary is likely to have swayed the jury into believing that he committed the charged residential burglary, especially if the jury was uncertain on the issue of identity.

After concluding that the trial court erred by admitting the evidence, we must decide whether admitting the evidence was harmless. Erroneous admission of other crimes evidence is prejudicial if it appears reasonably probable that without the error a result more favorable to the defendant would have been reached. (See *People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

We conclude that admitting the evidence was not harmless because it is reasonably probable that a result more favorable to the defendant would have been reached if evidence of the uncharged acts had not been introduced. It can reasonably be inferred that the prior bad acts influenced the jury, considering that at the first trial the uncharged acts were not introduced and the result was a mistrial, and at the second trial the uncharged acts were introduced and the result was a conviction. The introduction of the uncharged acts was the major difference between the first and second trial and most likely was the difference in the outcomes as well.

DISPOSITION

The judgment is reversed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.